

# Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?

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## I. INTRODUCTION

Legal scholars and policymakers are rightly concerned with access to justice, asking whether potential litigants from all economic backgrounds have meaningful access to the legal system.<sup>1</sup>

One response to this concern has been the promotion of alternative dispute resolution (ADR).<sup>2</sup> Over the last forty years, ADR processes, in particular, mediation and arbitration, have been advanced as vehicles to secure access to justice for individual litigants,<sup>3</sup> and to improve efficiency in overburdened court systems.<sup>4</sup> These processes have functioned as alternatives to the court adjudication of disputes, complementing the judicial system, and operating in what has been famously described as “the shadow of the law.”<sup>5</sup> The primary benefits promised by ADR were party autonomy and empowerment.<sup>6</sup> ADR processes would allow parties to “fit the forum to the

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<sup>1</sup> In this Article, the discussion of access to justice is limited to the civil justice system. Much has been written about the crisis in civil justice that has afflicted the lowest levels of the state court system—informal courts, including Family, Small Claims, and Housing courts. Nineteen million civil cases are filed each year in these courts, and the majority of these cases involve self-represented parties, who typically are low-income and members of a vulnerable population. See Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 748–49 (2015). In addition to the increase in self-represented litigants, court budgets in the informal courts have been greatly reduced. See Heather Scheiwe Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 CARDOZO J. CONFLICT RESOL. 361 (2013).

<sup>2</sup> ADR is an umbrella term that refers to alternatives to the court adjudication of disputes. The term ADR is also referred to as “appropriate dispute resolution” and “amicable dispute resolution.”

<sup>3</sup> See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 4–7 (6th ed. 2012) (describing goals and purposes of ADR movement); Larry Spain, *Alternative Dispute Resolution for the Poor: Is it an Alternative?*, 70 N.D. L. REV. 269 (1994).

<sup>4</sup> This is true in many countries. See generally FELIX STEFFEK ET AL., REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS (2013); EU MEDIATION LAW HANDBOOK: REGULATORY ROBUSTNESS RATINGS FOR MEDIATION REGIMES (Nadja Alexander et al. eds., 2017).

<sup>5</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (first describing the term in the context of divorce).

<sup>6</sup> See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253 (1989). Other perceived benefits included improving public satisfaction with the court system, increasing voluntary compliance with agreements, emphasizing the importance of neighborhood and community values and providing access to forums for

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fuss.”<sup>7</sup> These processes would give parties the opportunity to create their own mosaic of justice, personalized and individualized justice, not unlike the fairness remedies that equity courts had historically provided.<sup>8</sup>

Beyond the claims of individualized justice and efficiency, the reach of ADR's vision was ambitious, extending to multiple horizons. Scholars pushed its potential to promote transitional justice, the rule of law,<sup>9</sup> and international human rights.<sup>10</sup> Governments commissioned advisory groups to study ways that ADR could be used to improve access to justice,<sup>11</sup> and under the rubric of access to justice, ADR transformed civil justice systems. ADR has been exported to many developing countries under rule of law programs<sup>12</sup> and invoked in international peacemaking and diplomacy efforts.<sup>13</sup> More recently, the Global Pound Conference has engaged in conversations with multiple stakeholders in over thirty-one countries to determine how to improve access to justice and ADR throughout the world.<sup>14</sup> Scholars and policymakers

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people with problems, and providing alternatives to violence and litigation for the resolution of disputes. GOLDBERG, *supra* note 3 at 6.

<sup>7</sup> See Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

<sup>8</sup> E.g., Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329 (2005); accord Jacqueline M. Nolan-Haley, *Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004).

<sup>9</sup> Michal Alberstein, *Using ADR to Promote Transitional Justice and the Rule of Law*, 16 DISP. RESOL. MAG. 25 (2010). But see Jean Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569 (2007) (raising multiple questions about the relationship between ADR and the rule of law).

<sup>10</sup> Chris DeLaubenfels, *The Problem with the Duty to Adjudicate: How Mediations Can Promote International Human Rights*, 46 N.Y.U. J. INT'L L. & POL. 541 (2014).

<sup>11</sup> Dr. Lola Akin Ojelabi, *Improving Access to Justice Through Alternative Dispute Resolution: The Role of Community Legal Centres in Victoria, Australia*, Research Report, LA TROBE UNIVERSITY (Sept. 2010), at 6.

<sup>12</sup> E.g., Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2006); See Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 200–06 (1995).

<sup>13</sup> U.N. Secretary-General, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution*, U.N. DOC. A/68/811 (June 25, 2012); United Nations Guidance for Effective Mediation, annex (2012); U.N. Secretary-General, *Enhancing Mediation and its Support Activities*, U.N. DOC. S/2009/189 (April 8, 2009).

<sup>14</sup> Bryan J. Branon, *The Global Pound Conference Series: Shaping the Future of Dispute Resolution and Improving Access to Justice*, AMERICAN BAR ASSOCIATION, available at

continue to make the claim that the availability of ADR processes offers access to justice.<sup>15</sup>

Claims about ADR's ability to provide access to justice should be more modest. For, as it turns out, ADR falls short on its original promises, giving short shrift to the value of consent. Over the last few decades, party autonomy has diminished in both mediation and arbitration, and it is not clear that ADR has resulted in greater efficiencies for the courts.<sup>16</sup> In this Article, I question whether ADR processes have provided the kind of access to justice envisioned by proponents, or whether they have been stumbling blocks to achieving that goal.<sup>17</sup> My skepticism is prompted by the withering away of consent<sup>18</sup> in arbitration and mediation, two of the most commonly used ADR processes.<sup>19</sup> Arbitration and mediation have traditionally been considered consensual processes based on the foundational principles of autonomy and self-determination.<sup>20</sup> Consider the familiar mantra that arbitration is a creature

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[https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/newsletter/sept2016/branon\\_shaping\\_the\\_future.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/sept2016/branon_shaping_the_future.authcheckdam.pdf) (last visited Jan. 24, 2018).

<sup>15</sup> Task Force on Access to Justice and Alternative Dispute Resolution, *Access to Justice Through Alternative Dispute Resolution White Paper*, AMERICAN BAR ASSOCIATION (2015) [hereinafter ABA White Paper], available at [https://www.americanbar.org/content/dam/aba/images/dispute\\_resolution/publications/A2J\\_%20white\\_paper.pdf](https://www.americanbar.org/content/dam/aba/images/dispute_resolution/publications/A2J_%20white_paper.pdf) (last visited Jan. 24, 2018); Kulp, *supra* note 1, at 362. See also Rebecca Love Kourlis et al., *A Court Compass for Litigants*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (July 2016) (proposing a portal through which people could access an online dispute resolution model (including mediation) for resolving certain family law issues).

<sup>16</sup> See Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 560–62 (2008) (there is little empirical evidence to support the claim that ADR processes result in efficiency). Moreover, litigants may be unaware of the availability of ADR processes. See Donna Shestowsky, *When Ignorance Is not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017).

<sup>17</sup> See Anna Nylund, *Access to Justice: Is ADR a Help or Hindrance*, in THE FUTURE OF CIVIL LITIGATION: ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES, 325, 333 (Laura Ervo & Anna Nylund eds., 2014) (observing that in practice court-connected mediation does not contribute to an increased access to justice).

<sup>18</sup> In this Article, the term consent means informed consent. See *infra* text accompanying notes 110–12.

<sup>19</sup> In this Article, the term ADR processes refers to arbitration and mediation.

<sup>20</sup> See, e.g., Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 65 (1999); Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909 (2002) (noting that autonomy is a key value in arbitration). But see Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote*

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of contract,<sup>21</sup> or, that mediation is a voluntary, consensual process.<sup>22</sup> But, this rhetoric does not always reflect reality. In their zeal to relieve congested dockets and reduce business litigation costs, courts, legislatures, administrative agencies, and corporate officers have pushed to sell mediation, arbitration, and online versions of these processes.<sup>23</sup> Many times they do so with little regard for the consensual nature of these processes.<sup>24</sup> For example, arbitration has actually limited access to justice within the context of consumer and employment arbitration, rather than enabled it.<sup>25</sup> The same can be said of how some mediation foreclosure programs have operated.<sup>26</sup>

The shift away from consent in ADR disrespects the parties served by these processes. Beyond its assault on human dignity, the erosion of consent in consensual ADR processes is at odds with the values of the access to justice movement, and raises multiple policy questions—To what extent do mediation and arbitration, the most common forms of ADR, as practiced today, reflect the fairness values of the access to justice movement?<sup>27</sup> Does fairness include

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"Autonomy"?, 91 IND. L.J. 1143 (2015) (questioning the extent to which autonomy provides a basis for the strong enforcement of arbitration agreements).

<sup>21</sup> See, e.g., *United Steelworkers of America v. American Manufacturing Co.* 363 U.S. 564, 571 (1960); *Hall Street Assocs., LLC v. Mattel, Inc.* 552 U.S. 576, 585 (2008); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). But see Hiro N. Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ARB. & MEDIATION 2 (2016) (questioning the persuasiveness of this claim).

<sup>22</sup> *Model Standards of Conduct for Mediators*, AMERICAN BAR ASSOCIATION [hereinafter ABA *Model Standards*], available at [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf).

<sup>23</sup> See Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, 34 WINDSOR Y.B. ACCESS JUST. (2017) (arguing that the promise of ODR for increasing access to justice cannot be recognized unless it is fully integrated into the public justice system).

<sup>24</sup> For a critique of ODR's ability to provide access to justice, see Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717 (2017).

<sup>25</sup> See *infra* text accompanying notes 81–84. For a proposal to remedy the lack of consent in some forms of arbitration, see Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195 (2017) (forthcoming).

<sup>26</sup> See, e.g., *GMAC Mortgage, LLC v. Willoughby*, 165 A.3d 787 (N.J. 2017).

<sup>27</sup> Some countries make a conscious effort to reconcile mediation with the values of the access to justice movement. See, e.g., Mary Anne Noone & Lola Akin Ojelabi, *Ensuring Access to Justice in Mediation within the Civil Justice System*, 40 MONASH U. L. REV. 528, 528 (2014) (stating that in the context of Australia—"Ensuring mediation

substantive as well as procedural justice?<sup>28</sup> To what extent can mediation or arbitration, as a vehicle for increasing access to justice, provide an adequate framework for protecting rights when consent is diminished or eliminated?<sup>29</sup> ADR processes are often promoted as alternatives to the courts, giving parties the opportunity to bargain in the shadow of the law or in some cases, in the pale shadow of the law.<sup>30</sup> But, what if courts are the venue for the justice that people are seeking? At a more basic level is the question of what is meant by “access to justice.” Few would disagree that it is a core value in upholding the rule of law but there is less agreement over what the term includes.<sup>31</sup> Does it include, for example, access to processes that can resolve disputes? Does it mean access to courts that can offer litigants just results based on law? Or, is it a broader concept that includes innovative approaches for developing systemic solutions for delivering justice?<sup>32</sup>

These questions are relevant because they implicate the rule of law, a fundamental value in any system of justice. As noted by the European Court of Human Rights in 1975, “one can scarcely conceive of the rule of law

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reflects the values of the access to justice movement is a goal which policymakers, practitioners, and courts and tribunals aspire to.”).

<sup>28</sup> Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391 (2016); Noone & Ojelabi, *supra* note 27 (discussing empirical study on mediators' views regarding procedural and substantive justice).

<sup>29</sup> Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397, 416 (2012) (discussing Lord Neuberger's speech at the Fourth Civil Mediation Council National Conference in which “[he] argued that neither arbitration nor ADR can provide a framework for securing the enforcement of rights and the rule of law.”).

<sup>30</sup> See Marianna Hernández Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91 (2008).

<sup>31</sup> See Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865 (1998) (discussing differing views of justice within the context of ADR and mediation).

<sup>32</sup> See e.g., Michele M. Leering, *Enhancing the Legal Profession's Capacity for Innovation: The Promise of Reflective Practice and Action Research for Increasing Access to Justice*, 34 WINDSOR Y.B. ACCESS TO JUST. 189, 193 (2017) (“When the concept of access to justice expanded beyond courts and traditional reactive legal services this provoked new ways of thinking about how the justice system should work and challenged assumptions about the outcomes the justice sector should be expected to produce. This led to recommendations for designing proactive systemic solutions to minimize the disruptive and spiraling impact of legal troubles, developing approaches for the early resolution of legal problems, making dispute resolution and the justice system more accessible, and devoting new resources to increasing legal literacy and legal capability, in addition to other approaches.”).

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without there being a possibility of having access to the courts.”<sup>33</sup> Forty-two years later, the surge in the use of ADR processes has arguably hindered access to the courts and given life to the European Court of Human Rights prescient statement. Compulsory arbitration programs have effectively removed access to the courts for substantial segments of the population, a reality which has not escaped the attention of some members of the federal judiciary.<sup>34</sup>

Respect for human dignity and access to justice, the guidelines from this introductory Part, will provide the standards against which these questions about ADR will be assessed. This Article proceeds from here in four parts. Part II discusses the historical background of ADR's relationship to the access to justice movement. Part III describes the shift away from consensual regimes in ADR, and Part IV focuses on the underlying value of consent in ADR processes. Part V concludes with a call for more modesty in the claims made about ADR's ability to offer greater access to justice. It calls for increased vigilance in retaining the consensual features of ADR in order to foster an “access to justice consciousness”<sup>35</sup> that will motivate the legal profession to continued awareness and action in securing meaningful access to the legal system for all potential litigants.

## II. ADR: THE THIRD WAVE OF THE ACCESS TO JUSTICE MOVEMENT

### A. *Historical Background*

Access to justice is a fundamental principle of the rule of law. It is considered a basic social right in modern societies, and today, it is a familiar rallying cry throughout many parts of the United States and the world.<sup>36</sup> Policymakers deplore the justice deficits for impoverished populations, the

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<sup>33</sup> *Golder v. United Kingdom*, Eur. Ct. H.R. ¶ 34 (1975) (case cited in Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR*, 26 EUR. J. INT'L L. 607, 623 (2015)).

<sup>34</sup> See, e.g., Jed S. Rakoff, *Why You Won't Get Your Day in Court*, N.Y. REV. OF BOOKS (Nov. 24, 2016), available at <http://nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/> (last visited Jan. 24, 2018) (discussing mandatory arbitration clauses as one of seven reasons that parties are precluded from access to courts).

<sup>35</sup> See Leering, *supra* note 32, at 193 n.19 (describing “an evolving, formative, and normative concept about the profession's responsibility to be aware and act to ensure equal access to justice.”).

<sup>36</sup> See United Nations, *Access to Justice*, UNITED NATIONS AND THE RULE OF LAW, available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (last visited Jan. 24, 2018).

denial of legal rights and the pervasive lack of legal representation.<sup>37</sup> Multiple commissions, study groups, and legislative efforts are working toward achieving access to justice.<sup>38</sup>

In addition to being a fundamental principle of the rule of law, access to justice is both a theoretical and a law reform movement for social change. This movement was described thirty-nine years ago by Professors Mauro Cappelletti and Bryant Garth in their four-volume international and interdisciplinary study of access to justice as a “worldwide movement to make rights effective.”<sup>39</sup> Analyzing comparative global data, Cappelletti and Garth described what they labeled as three waves of law reform—legal aid, procedural devices to support class actions, and a third wave, promoting systemic reform of the legal system through ADR.<sup>40</sup> The core values of the access to justice movement were understood as accessibility, and fairness.<sup>41</sup>

At the time of the publication of Cappelletti and Garth’s access to justice project, ADR was already part of an emerging law reform movement in the United States. With the convening of the Pound Conference in 1976, prominent members of the legal profession promoted the use of ADR processes to improve overburdened court systems. Chief Justice Warren Burger led the charge to improve poorly managed courts<sup>42</sup> and would later

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<sup>37</sup> The term “access to justice” is frequently defined as “a way for low and middle-income to have access to representation in order to help them fare better in the court system.” ABA WHITE PAPER, *supra* note 15, at 1. Broader understandings of the term include innovation and systemic design changes in the justice system. *See* Leering, *supra* note 32, at 193.

<sup>38</sup> The American Bar Association has taken an active role and supported the development of state commissions to collect and analyze data to fund civil legal aid. *See generally* NATIONAL CENTER FOR ACCESS TO JUSTICE, <http://ncforaj.org/> (last visited Jan. 25, 2018). The theme of the 2018 AALS Law Teachers Conference held in San Diego in January 2018 was “Access to Justice.” *See also* Steinberg, *supra* note 1 (discussing access to justice initiatives).

<sup>39</sup> *See generally* ACCESS TO JUSTICE, Vols. 1–4 (M. Cappelletti ed. 1978 & 1979).

<sup>40</sup> Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282, 295 (1993). *But see* Nylund, *supra* note 17, at 326 (claiming that these categories are based on a broad international analysis and do not necessarily fit the context of Nordic countries).

<sup>41</sup> *See* Cappelletti, *supra* note 40, at 295. Since that time additional access to justice principles have been added by other governments. *See* Noone & Ojelabi, *supra* note 27, at 561 (describing Australian ADR initiatives, including the addition of the following principles: appropriateness, equity, efficiency and effectiveness).

<sup>42</sup> Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083, n.35 (2011). *See generally*, JEROME T. BARRETT AND JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT 182–83 (2004).



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pose what has now become a famous question in the history of ADR—"Isn't there a better way?"<sup>43</sup> Responding to the problem of overcrowded courts, the late Professor Frank Sander authored an influential conference paper, proposing the idea of a Multi-Door Courthouse where parties would be offered a range of judicial and non-judicial processes to resolve their disputes.<sup>44</sup> He conceptualized a close connection between the courts and ADR processes which were to be considered alternatives to the court adjudication of disputes, rather than a replacement of them.<sup>45</sup> The court would remain for Professor Sander "one door of the multi-door courthouse."<sup>46</sup>

To increase the accessibility of their voluminous study, Cappelletti and Garth published an article explaining some basic ideas underlying the access to justice movement.<sup>47</sup> In their discussion of ADR as the "third wave" of the access to justice project they cited Professor Frank Sander's Pound Conference Paper which had suggested the timeliness of introducing alternative processes into the courts.<sup>48</sup> They noted that access to justice was concerned with the "rights of ordinary people,"<sup>49</sup> who had struggled with the legal system. It was focused on giving effective rights to the "have-nots" against the "haves,"<sup>50</sup>—"consumers against merchants, tenants against landlords and employees against employers."<sup>51</sup> Cappelletti and Garth assumed

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<sup>43</sup> Warren Burger, *Isn't There A Better Way?*, 68 A.B.A.J. 274, 275 (1983).

<sup>44</sup> Frank E. A. Sander, *Varieties of Dispute Resolution*, Address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976) in 70 F.R.D. 79 (1976), at 111. [A. Levin and R. Wheeler eds. *The Pound Conference: Perspectives on Justice in the Future* (St. Paul, MN, West Publishing Co. 1979) 111].

<sup>45</sup> Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

<sup>46</sup> Frank Sander & Mariana Hernandez Crespo, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L.J. 665, 671 (2008) ("The court is where the cases are, so it is natural to have the court as one door of the multi-door courthouse—that is the idea. But it could be that the court could be over here and the other processes [arbitration, mediation, etc.] could be over there; there is nothing inherent [in the scheme] that prevents this.").

<sup>47</sup> Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978) [hereinafter Cappelletti & Garth, *The Newest Wave*].

<sup>48</sup> *Id.* at 225 n.144 (citing F. Sander, *Varieties of Dispute Processing*, a paper prepared for the original Pound Conference in 1976).

<sup>49</sup> Cappelletti & Garth, *The Newest Wave*, *supra* note 47, at 182 ("inspired by the desire to make the rights of ordinary people real").

<sup>50</sup> *Id.* at 241.

<sup>51</sup> *Id.* at 195.

that arbitration was a process for “consenting parties,”<sup>52</sup> and that courts would continue to play an important role in the development and enforcement of rights.<sup>53</sup> Nowhere in their report or their subsequent article explaining the report did Cappelletti and Garth imply that ADR processes would replace courts or that consent would be eliminated from consensual ADR processes.

### B. *Exporting ADR and the Rule of Law*

As the third wave in the access to justice movement, ADR was soon recognized for its potential to promote the rule of law in developing countries.<sup>54</sup> Africa represents one example of where this vision was realized.<sup>55</sup> In an effort to manage and prevent conflict, several organizations such as the World Bank,<sup>56</sup> the United States Agency for International Development, and the American Bar Association, actively engaged in exporting ADR and mediation training programs to Africa. The underling idea was that the resolution of ordinary disputes in a society would help to ensure the stability needed for preventing more serious conflicts. Recognizing that access to justice is an essential element of the rule of law, many of these programs included ADR in rule of law projects.<sup>57</sup>

ADR was also promoted as a vehicle to improve access to justice in countries with dysfunctional court systems.<sup>58</sup> However, in some countries, the

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<sup>52</sup> *Id.* at 232.

<sup>53</sup> *Id.* at 228, 239.

<sup>54</sup> See generally William Davis & Helga Trku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47 (2011). But see Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development?*, 2011 J. DISP. RESOL. 165 (2011) (questioning the viability of establishing ADR programs in countries with corrupt legal systems); Sternlight, *supra* note 9. For a critical view of exporting ADR, see Eduardo R. C. Capulong, *Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines*, 27 OHIO ST. J. ON DISP. RESOL. 641 (2012).

<sup>55</sup> See Jacqueline Nolan-Haley, *Mediation and Access to Justice in Africa: Perspectives from Ghana*, 21 HARV. NEGOT. L. REV. 59, 711–74 (2015).

<sup>56</sup> In addition to Africa, the World Bank has promoted ADR projects to improve access to justice in several other countries. See Vivek Maru, *Access to Justice and Legal Empowerment: A Review of World Bank Practice*, 2 HAGUE J. ON THE RULE OF L. 259, 259–81 (2010).

<sup>57</sup> More recently, scholars have questioned the efficacy of mandatory mediation in the context of labor disputes in South Africa and Mozambique. See Stella Vettori, *Mandatory Mediation: An Obstacle to Access to Justice*, 15 AFR. HUM. RTS. L.J. 355 (2015).

<sup>58</sup> See, e.g., Steven Austermiller, *Mediation in Bosnia and Herzegovina: A Second Application*, 9 YALE HUM. RTS. & DEV. L.J. 132, 132 (2006) (noting the paradox that “[A] nation born out of mediation turns to mediation again, this time to rescue its judiciary and promote the rule of law.”).

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claim of attaining access to justice through ADR may be dubious. Where there is no effective recourse to the court system for poor people, such as in many areas of Latin America, parties are in a weak bargaining position in ADR processes. This situation has been described in Latin America as creating three tiers of justice: private arbitration for those who can afford to hire an arbitrator, the justice system for those who can afford a lawyer, and mediation centers which are generally reserved for the poor who can afford neither. If parties do not accept what they are offered in mediation, then they receive nothing.<sup>59</sup>

### C. Assumptions About ADR and Access to Justice

In the United States, access to justice has historically been associated with access to the courts. That view is changing. The Dispute Resolution Section of the American Bar Association has argued for a broader definition that includes "access to legal representation, access to resolution of issues, and access to quality processes that do not necessarily include the court systems."<sup>60</sup> ADR processes are included within this expanded definition based on the assumption that they will offer greater access to justice.<sup>61</sup> Online dispute resolution is now proposed as a means of achieving greater access to justice.<sup>62</sup> Similar assumptions about access to justice underlie the push for mediation in other countries. For example, the European Union has expanded the understanding of access to justice to include "judicial as well as extrajudicial dispute resolution methods."<sup>63</sup> Through a series of directives, it has promoted

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<sup>59</sup> Mariana Hernandez Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91, 108, 115 (2008) (arguing that where ADR processes are introduced into dispute resolution systems that lack effective courts, as in many Latin American countries, there is a negative effect on access to justice).

<sup>60</sup> See generally ABA White Paper, *supra* note 15.

<sup>61</sup> *Id.*

<sup>62</sup> See *Court Compass: Mapping the Future of User Access Through Technology*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (May 2017), available at [http://iaals.du.edu/sites/default/files/documents/publications/court\\_compass\\_mapping\\_the\\_future.pdf](http://iaals.du.edu/sites/default/files/documents/publications/court_compass_mapping_the_future.pdf) (last visited Jan. 25, 2018). See generally J. J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993 (2017); Salter, *supra* note 23.

<sup>63</sup> See Directive 2008/52/EC of the EU Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. L. 136/3, ¶ 5, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>. Mediation was offered as a "cost-effective and quick extrajudicial resolution of disputes in

mediation and online dispute resolution.<sup>64</sup> Mediation was introduced in Russia based on the assumption that it would offer a “reliable guarantee to citizens of access to justice within a reasonable time.”<sup>65</sup> In Bosnia and Herzegovina mediation was promoted to improve judicial efficiency and promote democracy and the rule of law.<sup>66</sup>

The following section will discuss how the consensual aspects of consensual ADR processes have diminished over the last four decades.

### III. THE EROSION OF CONSENT IN ADR

In the last forty-one years since the first Pound Conference was convened in 1976, modern ADR, and in particular mediation, has become institutionalized in the justice system of countries throughout the world. In the United States, institutionalization includes mandates to mediate through compulsory court-annexed mediation programs. Beginning with the Civil Justice Reform Act,<sup>67</sup> mandatory mediation has been an acceptable form of dispute resolution<sup>68</sup> with the understanding that there is a distinction between coercion into mediation and coercion in the mediation process.<sup>69</sup> Compulsory

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civil and commercial matters through processes tailored to the needs of the parties.” *Id.* ¶ 6.

<sup>64</sup> In addition to the Mediation Directive, the EU has issued a Directive on Consumer ADR, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013L0011>. The EU also has an Online Dispute Resolution (ODR) Platform, available at <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN>.

<sup>65</sup> Kathryn Hendley, *Resistance, Indifference or Ignorance? Explaining Russians' Nonuse of Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 487, 489 (2017).

<sup>66</sup> Steven Austermiller, *Mediation in Bosnia and Herzegovina: A Second Application*, 9 YALE HUM. RTS & DEV. L.J. 132 (2006).

<sup>67</sup> The Act authorized each federal district to create ADR programs. *See* Civil Justice Reform Act, 28 U.S.C. §§ 471–82 (1990).

<sup>68</sup> *Atlantic Pipe Corp.*, 304 F.3d 136 (1st Cir. 2002) (holding that the ADR Act of 1998 requires courts to obtain party consent only when they order arbitration and not when they order the use of other ADR processes such as mediation).

<sup>69</sup> Frank Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 886 (1996). Sander’s famous distinction holds sway even today. *See, e.g., ADR and Civil Justice: CJC ADR Working Group Interim Report*, CIVIL JUSTICE COUNCIL, 47 (Oct. 2017) [hereinafter *CJC Interim Report*], <https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf>. (“Voluntariness in engaging in mediation is subject to a very important distinction which was first drawn in the 1970s by Professor Frank Sander . . . . Continued voluntary participation within a confidential mediation process once commenced (with freedom from criticism or sanction for withdrawal and return to litigation) is a fundamental and non-negotiable tenet of mediation. But this does not mean that requiring parties to engage in

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participation in mediation was considered by Professor Sander to be "a temporary expedient to get people to experience this process that the users find so helpful."<sup>70</sup> Following suit, other countries began developing various models of mandatory<sup>71</sup> and quasi-mandatory mediation programs which employ a variety of benefits and sanctions in order to incentivize parties to use mediation.<sup>72</sup>

Beyond the courts, the erosion of traditional consensual features has also become apparent as mediation is used as a regulatory tool by legislatures. Professor Lydia Nussbaum has explored the legislature's role in the U.S. in going beyond institutionalization and mandating mediation for private disputes.<sup>73</sup> Not only are parties forced to mediate in cases where substantive legal rights are involved, but they may also be instructed with a great deal of

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mediation in the first place, or sanctioning their failure to do so, necessarily subverts its principles or reduces its effectiveness. Parties must always be free not to settle, but it may be legitimate for a civil justice system to require them to attempt settlement.").

<sup>70</sup> Sander et al., *supra* note 69, at 886.

<sup>71</sup> In the case of England, as a result of amendments to the Civil Procedure Rule, courts have the discretion to impose costs on a party who unreasonably refuses to mediate. Some scholars have argued that this creates a situation in which parties are deprived of any choice. *See generally* Genn, *supra* note 29. More recently, the Civil Justice Working Council on ADR issued an interim report indicating that the group was considering whether to mandate the use of ADR processes. CJC *Interim Report*, *supra* note 69, at 45–50. For a discussion of the various incentives and sanctions employed in EU countries, see Prof. Giuseppe De Palo & Dr. Leonardo D'Urso, *Achieving a Balanced Relationship Between Mediation and Judicial Proceedings*, in EUROPEAN PARLIAMENT, THE IMPLEMENTATION OF THE MEDIATION DIRECTIVE 12–13 (2016). For a discussion of Europe's turn towards compulsory mediation, see Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation*, 37 N.C.J. INT'L L. & COM. REG. 981 (2012).

<sup>72</sup> *See, e.g.*, Julie Macfarlane, *Culture Change—A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241 (2002) (discussing features of mandatory mediation programs in two Canadian cities, Toronto and Ottawa); *see also* Vicki Waye, *Mandatory Mediation in Australia's Civil Justice System*, 45 COMM. L. WORLD REV. 214 (2016) (speaking critically of mandatory mediation developments in Australia). In some countries, mediation may be mandatory in theory, but not in practice. Vettori, *supra* note 57, at 377 (discussing mediation practice in South Africa).

<sup>73</sup> Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, 2016 UTAH L. REV. 361 (2016).

specificity to mediate in good faith,<sup>74</sup> to discuss specific topics, and they may be informed about whether they are allowed legal counsel.<sup>75</sup>

In the case of arbitration, consent has disappeared in some contexts. Scholars refer to an “arbitration epidemic” that deprives workers and consumers of their rights, including access to the courts.<sup>76</sup> Vulnerable populations, including nursing home patients,<sup>77</sup> have been shut out of courts and are required to arbitrate. However, few who are cut off from the courts and required to arbitrate actually do so.<sup>78</sup> Consent is further diluted when forced arbitration clauses are coupled with class action bans so that parties cannot join with other aggrieved parties in obtaining access to courts.<sup>79</sup>

In the following sections I discuss how diminished consent is not compatible with true access to justice.

### A. *The Problem with Diminished Consent in Mediation and Arbitration*

#### 1. *MEDIATION*

Mediation has traditionally been understood as a consensual process based on party self-determination.<sup>80</sup> This means simply that the parties who are affected by a dispute decide the outcome of that dispute. While consent may be understood differently by some individuals engaged in court practice,<sup>81</sup> it remains a core value of mediation. When parties are required to participate

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<sup>74</sup> Good faith requirements have generated significant litigation on the meaning of good faith. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

<sup>75</sup> Nussbaum, *supra* note 73, at 362.

<sup>76</sup> See, e.g., Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprive Workers of their Rights*, ECON. POL’Y INST. (Dec. 7, 2015), available at <http://www.epi.org/publication/the-arbitration-epidemic/>.

<sup>77</sup> See *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017); e.g., *Marmet Health Care Center, Inc., v. Brown*, 565 U.S. 530 (2012).

<sup>78</sup> Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015).

<sup>79</sup> In July 2017, the Consumer Federal Protection Bureau attempted to change this situation in part by prohibiting banks, credit card companies, and their financial institutions from including mandatory arbitration clauses in new contracts (Arbitration Agreements Rule). This effort was thwarted by the passage of a joint resolution in Congress and signed by the President on November 1, 2017.

<sup>80</sup> See ABA Model Standards, *supra* note 22, Standard I.

<sup>81</sup> See, e.g., Nancy Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787 (2001).

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in court mediation, consent is diminished and there is the potential for coercion. Diminished-consent mediation is particularly problematic in cases where unequal bargaining power exists<sup>82</sup> as subtle forms of pressure may be exerted on parties in court -annexed mediation programs.<sup>83</sup>

Take the example of self-represented parties who enter into agreements ignorant of their legal rights, thus risking potentially unjust results,<sup>84</sup> or pro se parties participating in mediation foreclosure programs. Good mediation practice requires that parties come to the table with relatively equal bargaining power and the ability to exercise self-determination. This is generally not the case for homeowners who participate in foreclosure mediation. Without legal defenses, they are vulnerable and lack power to make decisions about whether their loans can be modified.<sup>85</sup> In both of these cases,

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<sup>82</sup> There are other areas of power imbalance such as that which exists between self-represented litigants and debt collection attorneys in consumer credit actions. Some attorneys may attempt to collect debts that are not owed.

<sup>83</sup> This problem is not limited to the United States. See Yedan Li, *From "Access to Justice" to "Barrier to Justice"? An Empirical Examination of Chinese Court-Annexed Mediation*, 3 ASIAN J. L. & SOC'Y 377 (2016).

<sup>84</sup> E.g., Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47 (1996); Accord Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room*, 51 FAM. CT. REV. 87 (2013) (proposing special guidelines for mediators who work with self-represented parties); Robert Robinson, *Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of "Bad" Mediation for Low-Income Litigants*, 100 MARQ. L. REV. 1353, 1354 (2017) (noting that the risk of poor mediation by unskilled mediators intensifies when there are large numbers of low-income litigants who participate in court-annexed mediation programs).

<sup>85</sup> Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1953 (2013). The plight of the pro se party in mediation foreclosure programs is dramatically illustrated in *GMAC Mortg., LLC v. Willoughby*, 165 A.3d 787 (N.J. 2017). GMAC and Willoughby entered into a loan modification agreement which provided that if Willoughby made all the trial payments, the agreement would become permanent. Willoughby carried out her part of the bargain. GMAC then required her to re-enter mediation and accept a modification of her first mediation agreement made two years earlier. She moved to enforce the first agreement and was unsuccessful. In the course of the proceedings, her home was sold. The Supreme Court of New Jersey reversed the judgment of the Appellate Division and the case was remanded to the chancery court. The court's language is instructive:

The chancery court should have granted Willoughby's pro se motion to enforce the agreement. As we have said before, homeowners facing foreclosure—many of whom do not have the benefit of counsel, are particularly vulnerable when mired in financial difficulties. Our chancery courts are courts of equity and therefore must take pains to

given the benefits that flow from procedural justice, such as voice and participation, these parties may be satisfied with the mediation process,<sup>86</sup> and as a result, may be satisfied with the agreements they reach. But these outcomes may not always be desirable from a justice perspective; procedures which leave parties satisfied may also deprive them of substantive justice.<sup>87</sup>

## 2. ARBITRATION

The erosion of consent in arbitration is ubiquitous.<sup>88</sup> Diminished-consent arbitration is perhaps most evident in the growing use of boilerplate and adhesion contracts. Professor Jennifer Reynolds has written about “consent fictions” such as adhesion contracts which bind consumers to agreements which they were unaware they were making.<sup>89</sup> When adhesion contracts are part of arbitration and accepted by the courts, it creates an effect where arbitration displaces voluntary dispute resolution.<sup>90</sup> With respect to

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ensure that such homeowners receive the protection of the law from lending institutions and servicing agents who may seek unfair advantage.

*GMAC Mortg., LLC*, 165 A.3d at 796.

<sup>86</sup> It is interesting to note that in foreclosure mediations, even when parties may lose their homes, they report that the mediation process itself was valuable and fair. This perception has been attributed to the procedural justice benefits of voice and venting. See Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 59 (2017).

<sup>87</sup> See Richard Marcus, *Misgivings About American Exceptionalism: Court Access as a Zero-Sum Game*, LEGAL STUD. RES. PAPER SERIES, RESEARCH PAPER NO. 248 U.C. HASTINGS C. OF THE L. 53, 56 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3042903](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042903) (arguing that procedures that satisfy [the] participants and create the appearance of justice might also frustrate correct resolution of disputes and thus stymie real justice).

<sup>88</sup> Unfairness may often result from non-consensual arbitration. See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. OF EMPIRICAL LEGAL STUD. 1 (2011) (demonstrating the repeat player effect in employer arbitration. The study shows that employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases). For recent criticisms and proposals for reform, see Szalai, *supra* note 25 (proposing an amendment to the Federal Arbitration Act based on privacy rules recently adopted by the Federal Communications Commission). See also Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

<sup>89</sup> Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom*, 14 PEPP. DISP. RESOL. L.J. 245 (2014).

<sup>90</sup> Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002).



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boilerplate contracts, parties are subjected to boilerplate provisions without their consent, through compulsory arbitration provisions that eliminate their access to courts. This occurs despite the fact that in some types of cases people prefer to have their disputes heard by a court.<sup>91</sup> Most people do not read boilerplate provisions and even when they do, there is evidence to show that they do not understand it.<sup>92</sup>

### B. *The Critics*

There is no shortage of critics when it comes to forms of ADR which give short shrift to consent.<sup>93</sup> Owen Fiss' early critique, *Against Settlement*, explicitly focused on the problem of diminished consent, arguing that with ADR settlement processes "consent is often coerced . . . and although dockets are trimmed, justice may not be done."<sup>94</sup> Similar concerns have prompted scholars to call for caution when state interests, rather than party consent, promote and drive ADR.<sup>95</sup> Other scholars expressed concern for the poor, the

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<sup>91</sup> A study by Pew Charitable Trusts revealed that while private parties most often prefer to have their bank dispute cases heard in court, contractual obligations often leave them with no choice but to arbitrate. *Consumers Want the Right to Resolve Bank Disputes in Court*, THE PEW CHARITABLE TRUSTS (Aug. 17, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court> (last visited Jan. 26, 2018).

<sup>92</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 108 (Princeton University Press 2013). See Jeff Sovern et al., "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1 (2015) (describing online survey of 668 consumers showing that most consumers are unaware of and do not understand the import of arbitration clauses in their consumer contracts).

<sup>93</sup> See, e.g., Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005). Concern is not limited to the United States. See CJC Interim Report, *supra* note 69, at 45–50 (describing contemporary debates in England over the use of mandatory ADR/mediation provisions).

<sup>94</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

<sup>95</sup> See Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach Through the ECHR*, 26 EUR. J. INT'L L. 607, 634 (2015).

disenfranchised, and women.<sup>96</sup> Recent critics observe that “second-class justice [is] taking shape now . . . allowing no choice—taking place in secret.”<sup>97</sup>

Reflecting on his seminal study, Cappelletti himself recognized what he called the “hard questions in the third wave of the access to justice movement.”<sup>98</sup> These questions included the risk of providing only second-class justice due to the lack of procedural fairness typical of ordinary litigation or abuse by stronger parties where there was a lack of equal bargaining power.<sup>99</sup> Considering the breadth of mandatory arbitration provisions today that are included in contracts related to nursing homes, credit cards, car rentals, medical professionals, investment brokers, and many consumer services, these concerns have come to fruition. The breadth of such provisions are at odds with Cappelletti’s view that ADR, the third wave of the access to justice movement, is about justice and fairness, and that it reflects “a philosophy which accepts alternative remedies and processes, in so far as such alternatives can help to make justice fair and more accessible.”<sup>100</sup>

#### IV. INFORMED CONSENT

In 2016, at a meeting of the American Bar Association Dispute Resolution Section, an ethics panel engaged in a discussion of “Hot Topics and Old Chestnuts.”<sup>101</sup> The concept of informed consent was located in the “old chestnut” category. Despite its placement in this category, the principle of informed consent retains contemporary salience. Facebook, for example, has been criticized in recent years for conducting experiments on 700,000

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<sup>96</sup> See, e.g., Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 24 (2012). See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1994); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1547–51 (1991); Richard L. Abel, *The Contradictions of Informal Justice*, in R. L. Abel, *THE POLITICS OF INFORMAL JUSTICE*, VOL. 1 287 (Academic Press 1982). For an Australian perspective, see Mary Anne Noone, *ADR, Public Interest Law and Access to Justice: The Need for Vigilance*, 37 MONASH U.L. REV. 57 (2011).

<sup>97</sup> See Sanford M. Jaffe & Linda Stamato, *Private Justice: Losing Our Day in Court*, 34 ALTS. TO THE HIGH COST OF LITIG. 163 (2016).

<sup>98</sup> Cappelletti, *supra* note 40, at 288.

<sup>99</sup> *Id.* at 288, 290.

<sup>100</sup> *Id.* at 295.

<sup>101</sup> Kristen M. Blankley et al., *ADR Ethics: Hot Topics and Old Chestnuts*, in PRACTICE AREA TRACKS: ABA SECTION OF DISP. RESOL. 2016 SPRING CONFERENCE, 16 (2016), [https://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/2016-spring-conference/Programs\\_by\\_Practice\\_Area.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/dispute_resolution/2016-spring-conference/Programs_by_Practice_Area.authcheckdam.pdf) (last visited Jan. 26, 2018).

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users without their informed consent.<sup>102</sup> Pharmaceutical companies have been criticized by human rights groups for failing to honor informed consent when introducing drugs to developing countries.<sup>103</sup> Patients have been warned to be vigilant with doctors who fail to obtain informed consent.<sup>104</sup>

### A. *The Doctrine of Informed Consent*

Informed consent is deeply engrained in American culture as an ethical, moral, and legal concept.<sup>105</sup> In situations where the principle of informed consent applies, it is understood that a person's consent must be based on relevant information and be voluntary. Informed consent is a foundational principle that promotes human dignity, advances autonomy, and enhances party self-determination. This doctrine originated in medicine and was subsequently adopted by the legal profession.<sup>106</sup> Whether based in medicine or law, informed consent is not a 'one size fits all' proposition; it depends upon context.<sup>107</sup>

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<sup>102</sup> E.g., Dr. Catherine Flick, *Informed Consent and the Facebook Emotional Manipulation Study*, 12 RES. ETHICS 14 (2015), <http://journals.sagepub.com/doi/pdf/10.1177/1747016115599568>; accord Amy Bucher, *Facebook's Informed Consent Problem*, AMY BUCHER, PH.D. (June 30, 2014), <http://www.amybucherphd.com/20140630facebook-informed-consent-problem/>; see Christopher Zara, *Facebook Experiment Raises Legal Questions: Could Lawsuit Follow Mood Manipulation Research?*, INT'L BUS. TIMES (June 30, 2014), <http://www.ibtimes.com/facebook-experiment-raises-legal-questions-could-lawsuit-follow-mood-manipulation-research-1615970>.

<sup>103</sup> See generally Stacey B. Lee, *Informed Consent: Enforcing Pharmaceutical Companies' Obligations Abroad*, 12 HEALTH & HUM. RTS. J. 15 (2010) (discussing the Pfizer Company's activities in Nigeria).

<sup>104</sup> Nichole Bazemore, *Not All Doctors Obtain Informed Consent—Here's Why It's Hurting Patients*, FORBES (Mar. 28, 2016, 7:00 AM), <https://www.forbes.com/sites/amino/2016/03/28/not-all-doctors-get-informed-consent-heres-why-its-hurting-patients/#50cd5762496c>.

<sup>105</sup> See generally RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986).

<sup>106</sup> See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

<sup>107</sup> See Christine Grady et al., *Informed Consent*, 376 N. ENGL. J. MED. 856 (2017).

### B. *Consent in Mediation and Arbitration*

Informed consent has evolved from the fields of law and medicine to become a foundational principle in consensual ADR processes.<sup>108</sup> In mediation, for example, the Model Standards of Practice for Mediators interpret party self-determination as the act of making “free and informed choices as to process and outcome.”<sup>109</sup> The mediation ethics codes of many other countries also consider informed consent to be a foundational value.<sup>110</sup> Likewise, arbitration is frequently referred to as a matter of consent, not coercion.<sup>111</sup> Federal courts frequently remind us that the Federal Arbitration Act (FAA) does not require parties to arbitrate when they have not agreed to do so.<sup>112</sup>

The principle of informed consent in consensual ADR processes is not an end in itself, but is a means of achieving the basic goal of fairness. Fairness has both procedural and substantive elements. For example, fairness requires that parties know what they are doing when they commit to participate in a process such as mediation, that they understand their right to withdraw from the process at any time, and finally, that they understand the outcome reached in mediation.<sup>113</sup> I do not claim that informed consent guarantees access to justice. Consent is not a magic wand that necessarily produces just results. Professor Jennifer Reynolds has powerfully reminded us of how luck often intervenes and distorts the justice of mediated settlements.<sup>114</sup> In theory, however, consent remains a foundational principle in ADR processes, such as mediation and arbitration. It is invoked to legitimize many different types of

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<sup>108</sup> See Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999); see also Michael T. Colatrella Jr., *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties*, 15 CARDOZO J. CONFLICT. RESOL. 705 (2014).

<sup>109</sup> ABA Model Standards, *supra* note 22.

<sup>110</sup> E.g., *European Code of Conduct for Mediators*, EUR. COMMISSION (2004), [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf); *accord Code of Professional Conduct*, INT'L MEDIATION INST., <http://www.imimmediation.org/practitioners/code-professional-conduct/>; see generally, Melissa Katsoris, *Does Nationality Influence Neutrality? The Ethical Standards and Expectations of International Mediators*, 39 FORDHAM INT'L L.J. 695 (2016).

<sup>111</sup> See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of Leeland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

<sup>112</sup> See *id.* See also *United Steelworkers of America v. American Manufacturing Co.* 363 U.S. 564, 571 (1960); *Hall Street Assocs., LLC v. Mattel, Inc.* 552 U.S. 576, 585 (2008); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

<sup>113</sup> See generally Nolan-Haley, *supra* note 108.

<sup>114</sup> See Reynolds, *supra* note 89.

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behaviors that might otherwise be objectionable, such as the same judge acting as a mediator and trial judge in a case, the same person acting as both arbitrator and mediator in the med-arb process,<sup>115</sup> disclosure of confidential information, and mediator conflicts of interest.

### C. *Erosion of Consent*

In recent years, there has been a withering away of informed consent in several fields in addition to ADR. Lawyers, for example, do not always practice informed consent in counseling clients<sup>116</sup> despite the clear mandate of the ABA Rules.<sup>117</sup> Pharmaceutical companies do not always honor informed consent when experimenting with new drug products in developing countries. While informed consent may be part of the protocol, it is selectively followed with disclosures that are less than candid and fail to reveal all the serious risks involved in clinical trials.<sup>118</sup> Some physicians speak quite openly of the erosion of informed consent in medical research.<sup>119</sup> Bioethicists argue for limits to

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<sup>115</sup> Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 319, 360 (2011). For a discussion of why informed consent does not provide true self-determination in the Med-Arb process, see Brian Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 191 (2015).

<sup>116</sup> Kimberlee K. Kovach, *The Duty to Disclose Litigation Risks and Opportunities for Settlement: The Essence of Informed Decision-Making*, 33 LA VERNE L. REV. 71 (2011).

<sup>117</sup> Model Code of Responsibility Rule 1.4(b) requires that lawyers "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROF'L CONDUCT R. 1.4(B) (AM. BAR. ASS'N., Discussion Draft 1983).

<sup>118</sup> See Lee, *supra* note 103.

<sup>119</sup> Ruth Macklin, *Erosion of Informed Consent in Medical Research*, THE DOCTOR'S TABLET BLOG (Nov. 16, 2016), <http://blogs.einstein.yu.edu/the-erosion-of-informed-consent-in-medical-research/>; George J. Annas & Catherine L. Annas, *Legally Blind: The Therapeutic Illusion in the Support Study of Extremely Premature Infants*, 30 J. CONTEMP. HEALTH L. AND POL'Y, 1, 2 (2013) (strongly disagreeing with the claim "that medical research requires abandoning or diluting informed consent or treating patients as passive objects for the valid purpose of improving the quality of care for all."). Sabrina Tavernise, *Premature Babies Study Raises Debate over Risks and Ethical Consent*, N.Y. TIMES (Sep. 7, 2015) (quoting George J. Annas, director of the Center for Health Law, Ethics and Human Rights at Boston University School of Public Health: "the consensus in the bioethics community was that the informed consent was not adequate, and that hasn't changed.").

informed consent in developing fields, such as biobanking.<sup>120</sup> Others endorse specific rationales for waiving consent in medical research.<sup>121</sup> In the field of precision medicine,<sup>122</sup> which promotes the ideal of individualized health plans,<sup>123</sup> bioethics scholars describe a drifting away from the principle of informed consent<sup>124</sup> and patient empowerment.<sup>125</sup> The shift away from fidelity to informed consent principles has consequences that matter to human dignity. In the words of one bioethicist, in moving away from the principle of informed consent, we “drift away from showing [people] the respect they deserve.”<sup>126</sup>

The erosion of informed consent in the field of precision or personalized medicine shares similarities to what is happening in ADR with its promise of personalized justice. Advances in genomic medicine have led bioethics scholars to describe an ideological shift in informed consent resulting in a dilution of patient autonomy, a “turn away from ‘patient empowerment’ and toward expert-mediated decisionmaking in the clinical setting.”<sup>127</sup> One example of the shift away from informed consent in precision medicine is seen in efforts to produce more perfect babies. Bioethics literature refers to the enthusiasm for prenatal testing in the search for fitter babies, an increase in the routine of prenatal genetic testing, and a decrease in offering an authentic process that permits patients to give informed consent to this

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<sup>120</sup> Arthur L. Caplan, *What No One Knows Cannot Hurt You: The Limits of Informed Consent in the Emerging World of Biobanking*, in THE ETHICS OF RESEARCH BIOBANKING 25, 25–32 (Solbakk, Holm, & Hofmann eds., 2009).

<sup>121</sup> Luke Gelinas, Alan Wertheimer, & Franklin G. Miller, *When and Why Is Research Without Consent Permissible?*, 46 HASTINGS CTR. REP. 35 (2016).

<sup>122</sup> Precision medicine which derives from the Human Genome Project has been described as “an approach to health care that tailors disease diagnosis, treatment, and prevention to individual variability in genes, environment, and lifestyle.” Maya Sabatello & Paul S. Appelbaum, *The Precision Medicine Nation*, 47 HASTINGS CTR. REP. 19, 19 (2017). The National Institutes of Health (NIH) defines precision medicine as “an emerging approach for disease treatment and prevention that takes into account individual variability in genes, environment, and lifestyle for each person.” See *Precision Medicine*, Lister Hill National Center for Biomedical Communications, U.S. National Library of Medicine, National Institutes of Health, Dpt. Of Health & Human Services, Jan. 10, 2017 (on file with author).

<sup>123</sup> Eric Juengst et al., *From “Personalized” to “Precision” Medicine: The Ethical and Social Implications of Rhetorical Reform in Genomic Medicine*, 46 HASTINGS CTR. REP. 21, 21–22 (2016).

<sup>124</sup> See Erik Parens, *Drifting Away from Informed Consent in the Era of Personalized Medicine*, 45 HASTINGS CTR. REP. 16 (2015).

<sup>125</sup> Juengst et al., *supra* note 123.

<sup>126</sup> Parens, *supra* note 124, at 19.

<sup>127</sup> Juengst et al., *supra* note 123, at 22. The authors described this as an ideological shift in the developing practice of genomic medicine illustrated by the movement’s rebranding from personalized to precision medicine.

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testing.<sup>128</sup> Concerned that with these efforts we are moving away from giving people the respect to which they are entitled, one bioethics scholar has commented:

[I]n our excitement about the technological capacity to gather genomic data at an ever-lower cost, we are drifting away from what has long been a basic ethical commitment; to offer persons a process that enables them to provide informed consent before they or anyone else accesses their genetic information . . . . It would be painfully ironic if, in our pursuit of personalized medicine in the sense of medicine tailored to persons' genomes, we inadvertently abandoned our pursuit of personalized medicine in the sense of medicine that shows respect for persons.<sup>129</sup>

Could a similar observation be made with respect to ADR access to justice claims? What has happened to the individualized justice based on party self-determination that was promised by ADR proponents? Is it possible that future generations will conclude that in their enthusiasm to be efficient, reduce business costs, clear dockets, and relieve burdened court systems, policymakers imposed mediation and arbitration on several groups of vulnerable people in the name of access to justice, and in so doing, abandoned the core values upon which their foundation rests?

To prevent this from happening, we need to engage our imagination and begin to reflect on what it means to cultivate an "access to justice consciousness" from an ADR perspective. In my view, a preliminary sketch begins with fidelity to informed consent principles. Although this in itself does not assure access to justice, its absence signals vulnerability in the search for access to justice. Following consent, a variety of expectations come to mind including fairness, equality of access to the legal system (as well as to alternatives to court-based dispute resolution), awareness of ADR options,<sup>130</sup> procedural justice, and substantive justice. Respect for the dignity of litigants from all economic backgrounds is at the core of "access to justice consciousness."

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<sup>128</sup> Parens, *supra* note 124, at 18–19.

<sup>129</sup> *Id.*, at 16, 19.

<sup>130</sup> Shestowsky (2017), *supra* note 16.

## V. CONCLUSION

The erosion of consent in ADR processes implicates the quality of justice to which the access to justice reform movement has aspired. The history of the access to justice movement shows that it was concerned with securing the rights of ordinary people. However, implementation of ADR processes, the third wave of the access to justice movement, has in several respects minimized the rights of ordinary people by diminishing the role of consent, and in some cases, restricting access to the courts. This is not to claim that courts should be the exclusive forum for resolving disputes. Nor is it to deny that ADR processes such as mediation and arbitration should be readily available under the rubric of access to justice or that they have potential to serve underrepresented groups in certain kinds of cases.<sup>131</sup> It seems clear, however, that the original concern of the modern access to justice movement was focused on protecting the rights of ordinary people, not with restricting their access to the courts. We should be faithful to that intent.

Given the power of established business interests to restrict the rights of ordinary people, whether they be consumers, employees, or home owners, we are at a time in our history where greater modesty is called for in the claims we make about achieving access to justice through ADR processes. For mediation and arbitration to offer access to justice, they must be understood and practiced as consensual processes. Consent outperforms coercion. With the resurgence of interest today in the goal of achieving access to justice, it makes sense to step back, review the origins of the access to justice movement, and reflect on the direction in which it is moving. This approach will be useful in cultivating an ADR “access to justice consciousness” which will resist the erosion of consent in ADR, raise awareness, and inspire action to secure equal access to justice for potential litigants from all economic backgrounds.

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<sup>131</sup> See ABA White Paper, *supra* note 15, at 2 (claiming that if “unrepresented parties have an opportunity to engage in a dispute resolution process (with or without legal counsel), they can benefit from the procedural informality involved as well as a focus on interests and resolution as opposed to victory or loss in a court procedure.”).